Quality Investigations, Inc. *and* James Neeley. Case 15–CA–236469

June 16, 2021

DECISION AND ORDER

BY CHAIRMAN MCFERRAN AND MEMBERS KAPLAN AND RING

The Acting General Counsel has moved for summary judgment in this case, asserting that there are no genuine issues of material fact as to the allegations in the complaint. The Acting General Counsel further asserts that the Board should find, as a matter of law, that Quality Investigations, Inc. (the Respondent) violated Section 8(a)(5) and (1) of the Act by failing to deposit unused hourly health and welfare benefits into the 401(k) accounts of its employees as required by the collective-bargaining agreement. For the reasons set forth below, we grant the motion for summary judgment.

Pursuant to charges filed on June 13, 2018, and February 22, 2019, and amended on July 29, 2019, the General Counsel issued a consolidated complaint on December 31, 2019.[1] The Respondent filed an answer to the consolidated complaint on January 14, 2020. On March 2, 2020, the Regional Director approved the request of Charging Party Perry Hines to withdraw his charges and, accordingly, dismissed paragraphs 8(a) and (b) of the consolidated complaint.[2] On March 9, 2020, the Respondent filed an amended answer admitting, with clarifications, the facts set forth in the complaint pertaining to the remaining unfair labor practice allegation. The Respondent's amended answer also denied that it had violated the Act and asserted affirmative defenses.

On March 4, 2021,[3] the Acting General Counsel filed a Motion for Summary Judgment; the Respondent did not file an opposition. On March 26, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Board issued a second notice on April 23. The Respondent did not file a response to either Notice to Show Cause. The allegations in the motion are therefore undisputed.[4]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

"It is a settled principle that for summary judgment to be appropriate the record must show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Conoco Chemicals Co.*, 275 NLRB 39, 40 (1985) (citing *Stephens College*, 260 NLRB 1049, 1050 (1982)).

In its amended answer to the consolidated complaint, the Respondent admits the allegations that it "has failed to deposit unused hourly health and welfare benefits into the 401(k) accounts of its employees as required by the collective-bargaining agreement," that these benefits were mandatory subjects of bargaining, and that it did not provide the Union[5] prior notice or, as discussed below, an opportunity to bargain regarding the above conduct. Accordingly, these facts are not in dispute.

The consolidated complaint alleged elements of both an unlawful midterm modification of the contract and a unilateral change to unit employees' terms and conditions of employment,[6] but the motion for summary judgment

[1] On October 28, 2019, the General Counsel issued a complaint in Case 15–CA–236469, based on charges filed by Charging Party James Neeley. The Respondent filed an answer on November 12, 2019. After additional charges were filed by Charging Party Perry Hines, the Regional Director consolidated Case 15–CA–236469 with Case 15–CA–222091 on December 31, 2019.

[2] We have amended the caption to reflect that the charges in Case 15–CA–222091 have been withdrawn.

[3] All subsequent dates are in 2021, unless otherwise indicated.

[4] Copies of the initial and supplemental Notice to Show Cause were served on the Respondent by certified and regular mail. The initial certified copy was returned to the Board on April 12, with a United States Postal Service note "Forward Expired." The supplemental certified copy was returned to the Board on May 7, marked "Not Deliverable as Addressed Unable to Forward." Neither the initial nor supplemental Notice to Show Cause served on the Respondent by regular mail was returned. The Respondent's business appearing to have been dissolved, the Board also served copies of the supplemental Notice to Show Cause on the Respondent's Commercial Registered Agent on file with the Nevada Secretary of State by certified and regular mail. Both were returned to the Board on May 10, marked "Unclaimed Unable to Forward." It is well established that a respondent's refusal or failure to claim certified mail, or failure to provide for receiving service, cannot serve to defeat the purposes of the Act. See *Ringo Services, Inc.*, 369 NLRB No. 143, slip op. at 1 fn. 1 (2020); *National Automatic Sprinklers*, 307 NLRB 481, 481 fn. 1 (1992). Further, failure of the Postal Service to return regular mail indicates actual service of the document. *Lite Flight, Inc.*, 285 NLRB 649, 650 (1987), enfd. sub nom. *NLRB v. Sherman*, 843 F.2d 1392 (6th Cir. 1988).

The Respondent filed its answer to the initial complaint and its answer and amended answer to the consolidated complaint through counsel. Since approximately February 22, 2021, however, the Respondent appears not to have been represented by counsel in this proceeding and, since that time, has failed to respond to the Motion for Summary Judgment and the Notices to Show Cause. Merely being unrepresented by counsel does not establish a good cause explanation for failing to respond to Board filings. See *Lockhart Concrete*, 336 NLRB 956, 956957 (2001) (discussing pro-se respondents' failures to timely answer complaints).

[5] International Union, Security, Police and Fire Professionals of America.

[6] Specifically, par. 8(c) alleges that the Respondent failed to adhere to the requirements of the collective-bargaining agreement, while par. 8(e) alleges that the Respondent acted without providing the Union notice and opportunity to bargain.

before us is limited to the unlawful midterm modification theory of the case. Accordingly, we are deciding the case on that basis.[7] In order to establish an unlawful midterm modification violation,

> the General Counsel must show a contractual provision, and that the employer has modified the provision. The allegation is a failure to adhere to the contract. In terms of defenses … [a] defense to the contract modification can be that the union has consented to the change. In terms of remedy, a remedy for a unilateral change is to bargain; the remedy for a contract modification is to honor the contract.

Bath Iron Works Corp., 345 NLRB 499, 501–502 (2005), enfd. sub nom. *Bath Marine Draftsmen's Assn. v. NLRB*, 475 F.3d 14 (1st Cir. 2007); see also *Knollwood Country Club*, 365 NLRB No. 22, slip op. at 1–3 (2017).

We find that the Respondent's admitted failure to deposit funds into employee 401(k) accounts as required by the collective-bargaining agreement without notice to the Union establishes a modification of the contract within the meaning of Section 8(d) in violation of Section 8(a)(5) and (1).[8] *Nick Robilotto Inc.*, 292 NLRB 1279, 1280 (1989) (failure to adhere to terms of a collective-bargaining agreement "without notice to the Union" established unlawful contract modification without consent of the union); see also *Hotel Donatello*, 311 NLRB No. 101 (1993) (granting summary judgment where respondent's admitted failure to pay contractually agreed-upon wage increases and payments to benefit funds established all facts material to 8(a)(5) and (1) violation).

Accordingly, we find that the Respondent has failed to raise a genuine issue of material fact warranting a hearing and that the Acting General Counsel is entitled to judgment as a matter of law, and we grant the Acting General Counsel's motion for summary judgment.[9]

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent has been a corporation with an office and place of business in Bryant, Arkansas and has been providing security services at federal government buildings. Annually, in conducting its operations, the Respondent has been engaged in providing security services to the United States valued in excess of $50,000. Annually, in conducting its operations, the Respondent purchased and received at its Bryant, Arkansas facility products, goods, and materials valued in excess of $5000 directly from points outside the State of Arkansas. Based on the operations described above, we find that the Respondent constitutes an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

We further find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

1. At all material times, the following individuals held the positions set forth opposite their respective names and have been supervisors of the Respondent within the meaning of Section 2(11) of the Act and agents of the Respondent within the meaning of Section 2(13) of the Act:

Jim Kendall	-	Site Manager
Brad Williams	-	Lieutenant

2. (a) The following employees of the Respondent, the unit, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and part-time protective services officers and alarm monitors employed at worksite locations

[7] See generally *Midwest Terminals of Toledo International, Inc.*, 362 NLRB 468, 468 fn. 2 (2015), affd. 365 NLRB No. 157 (2017) (although the complaint alleged that the respondent ceased dues checkoff without affording the union notice and opportunity to bargain, the contract modification argument was clearly presented as the General Counsel argued that respondent ceased deducting dues at a time when it was "legally and contractually" bound to continue such deductions), enfd. 783 Fed.Appx. 1 (D.C. Cir. 2019); accord *San Juan Bautista Medical Center*, 356 NLRB 736, 738 fn. 10 (2011).

Similarly, the General Counsel here alleged, and the Respondent admitted, that the deposit of funds into unit employees' 401(k) accounts was "required by the collective-bargaining agreement."

[8] Further, the Respondent has not raised any affirmative defense contending that it was privileged to fail to abide by the contract terms concerning these deposits. See *Bath Iron Works*, supra.

[9] In its amended answer, the Respondent qualified that it engaged in the alleged unlawful conduct "at times still to be determined after January 1, 2019." The Respondent also asserts that it no longer provides services in the State of Arkansas where the unit was located and no longer employed the unit employees as of June 30, 2019. In a subsequent filing, the Respondent asserted that it was no longer in business. The online business portal maintained by the Nevada Secretary of State, where the Respondent's address is located, confirms this. Because the Respondent admits to the allegation in par. 8(c) of the consolidated complaint, its qualification does not raise any genuine issues of material fact as to whether its conduct violated the Act. To the extent its assertions could affect how much money the Respondent owes, we leave the resolution of that issue to the compliance phase of these proceedings.

We also reject the Respondent's affirmative defenses and treat the Motion for Summary Judgment as conceded because the Respondent did not file an opposition to the Motion or a response to either Notice to Show Cause. *Betteroads Asphalt, LLC & Betterecycling Corp.*, 369 NLRB No. 114, slip op. at 2 fn. 2 (2020) (citing Sec. 102.24(b) of the Board's Rules and Regulations ("If the opposing party files no opposition or response, the Board may treat the motion as conceded, and default judgment, summary judgment, or dismissal, if appropriate, will be entered.")).

throughout the State of Arkansas; but excluding all other employees, including office clericals and any other supervisors as defined in the National Labor Relations Act.

(b) Since about December 19, 2016, and at all material times, the Respondent has recognized the Union as the exclusive collective-bargaining representative of the unit. This recognition is embodied in an email from the Respondent to the Union dated December 19, 2016, and a collective-bargaining agreement effective from September 1, 2017, to August 30, 2020.

(c) At all times since about December 19, 2016, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of the unit.

3. (a) Since about January 1, 2019, the Respondent has failed to deposit unused hourly health and welfare benefits into the 401(k) accounts of its employees as required by the collective-bargaining agreement.

(b) The subjects set forth above relate to wages, hours, and other terms and conditions of employment of the unit and are mandatory subjects for the purposes of collective bargaining.

(c) The Respondent engaged in the conduct described above without the Union's consent.

CONCLUSION OF LAW

By the conduct described above in paragraph 3, the Respondent has been failing and refusing to bargain collectively and in good faith with the exclusive collective-bargaining representative of its employees within the meaning of Section 8(d) of the Act, in violation of Section 8(a)(5) and (1) of the Act. By its conduct, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent violated Section 8(a)(5) and (1) of the Act by failing to deposit contractually required unused hourly health and welfare benefits into unit employees' 401(k) accounts since about January 1, 2019, we shall order the Respondent to make all such delinquent deposits that have not been made since that date, including any additional amounts due the 401(k) accounts in accordance with *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979).[10] Further, the Respondent shall be required to reimburse unit employees for any expenses ensuing from its failure to make the required deposits as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891, 891 fn. 2 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981). Such amounts shall be computed in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).[11]

Finally, because the Respondent indicated that its employment relationship with its employees has ceased, we shall order the Respondent to mail a copy of the attached notice to the Union and to the last known addresses of its former unit employees in order to inform them of the outcome of this proceeding.

ORDER

The National Labor Relations Board orders that the Respondent, Quality Investigations, Inc., Bryant, Arkansas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain collectively and in good faith with the Union as the exclusive collective-bargaining representative of the employees in the following unit by failing to deposit unused hourly health and welfare benefits into the 401(k) accounts of employees as set forth in the September 1, 2017, to August 30, 2020 collective-bargaining agreement with the Union.

All full-time and part-time protective services officers and alarm monitors employed at worksite locations throughout the State of Arkansas; but excluding all other employees, including office clericals and any other supervisors as defined in the National Labor Relations Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make all required delinquent deposits to the applicable 401(k) accounts on behalf of unit employees, including any additional amounts due the accounts, in the manner set forth in the remedy section of this decision.

[10] We leave to compliance the determination of how much money the Respondent owes based on its assertions that it no longer employed the unit employees as of June 30, 2019, failed to deposit the unused hourly health and welfare benefits "at times still to be determined after January 1, 2019," and has ceased operations.

[11] To the extent that an employee has made personal contributions to a 401(k) account that are accepted by the account in lieu of the employer's delinquent deposits during the period of the delinquency, the Respondent will reimburse the employee, but the amount of such reimbursement will constitute a setoff to the amount that the Respondent otherwise owes the account.

(b) Reimburse unit employees for any expenses ensuing from the Respondent's failure to make the required payments to the 401(k) accounts, in the manner set forth in the remedy section of this decision.

(c) Within 14 days after service by the Region, duplicate and mail, at its own expense and after being signed by the Respondent's authorized representative, copies of the attached notice marked "Appendix"[12] to the Union and to all unit employees who were employed by the Respondent at any time since January 1, 2019. In addition to the mailing of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means.

(d) Within 21 days after service by the Region, file with the Regional Director for Region 15 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. June 16, 2021

Lauren McFerran, Chairman

Marvin E. Kaplan, Member

John F. Ring, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to bargain collectively and in good faith with the Union as the exclusive collective-bargaining representative of the employees in the following bargaining unit by failing to deposit unused hourly health and welfare benefits into the 401(k) accounts of employees as set forth in the September 1, 2017 to August 30, 2020 collective-bargaining agreement with the Union.

All full-time and part-time protective services officers and alarm monitors employed at worksite locations throughout the State of Arkansas; but excluding all other employees, including office clericals and any other supervisors as defined in the National Labor Relations Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL make all required delinquent deposits to the applicable 401(k) accounts on your behalf, including any additional amounts due to your accounts.

WE WILL reimburse you for any expenses ensuing from our failure to make the required deposits to your 401(k) accounts.

QUALITY INVESTIGATIONS, INC.

The Board's decision can be found at www.nlrb.gov/case/15-CA-236469 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

[12] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Mailed by Order of the National Labor Relations Board" shall read "Mailed Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."